

The goal of the proposed changes is to address system failures for two groups:

1. Low-income households who cannot afford to repair a failing system; and
2. The bad actor that refuses to make the repairs (or cannot be found).

Group 1 is addressed through revisions to the betterment loan and onsite sewage indemnification fund statutes.

Group 2 is addressed by clarifying current local civil penalties authority and, after all other options have been exhausted, authorizes localities to make the repairs and place a lien on the property to recover the costs in the same way localities can currently address nuisances in 15.2-1115.

What follows is a review of the draft changes that the working group has discussed and appears to have developed consensus around:

Changes on lines 1 - 2 and 4 - 5 and 10 clarify that betterment loans can be used for onsite conventional, alternative and alternative discharging systems.

The change on lines 7 - 8 authorizes the Board of Health to utilize a portion of the Onsite Sewage Indemnity Fund to address Group 1.

Lines 56 - 58 addresses an authorized use of the Fund that has not been utilized since at least 2008 and may be obsolete.

Line 59 increases the amount of existing fees supporting the Indemnification Fund in an attempt to keep pace with the overall increase in fees over the past several years.

The changes on Lines 107 - 112 are heart of the effort to address Group 1. It allows up to 25% of the Fund to be used to provide betterment loans or guarantees for those loans. (Changes to the definition of a betterment loan are necessary and are addressed later.)

The changes to 15.2 - 2157 address Group 2.

Changes on lines 131 - 134 makes the use of local civil penalties more viable.

Changes on lines 143 - 150 authorizes localities, if civil penalties have failed to cause a resolution of the system failure, to seek an injunction and record a document informing purchasers that a lien is pending.

Lines 181 - 201 adds a new section that authorizes the locality to make repairs, only after all other actions have failed to produce a remedy, and place a lien on the property to recover the cost. This language closely tracks the nuisance language in 15.2 - 1115.

Finally, the changes to lines 213 and 214 revises the definition of a betterment loan to clarify that alternative onsite systems are eligible and that the Board of Health is authorized to make such loans.

1 § 32.1-164.1:2. Eligibility for betterment loans to repair or replace failing onsite, alternative
2 onsite sewage systems and alternative discharging sewage systems.

3 A. The Board shall establish a betterment loan eligibility program to assist owners with the
4 repair, replacement, or upgrade of failing or noncompliant onsite sewage systems including
5 alternative onsite sewage systems and alternative discharging sewage systems, and the Board
6 may identify sources for betterment loans to be provided by private lenders, directly or through
7 conduit lenders. To the extent authorized and limited by § 32.1-164.1:01, the Board may utilize
8 the funds of the Onsite Sewage Indemnity Fund to provide or guarantee such loans. In addition,
9 owners may also apply to the Department for betterment loan eligibility to upgrade an onsite,
10 alternative onsite, or alternative discharging sewage system that is not failing, provided such
11 upgrade is for the purposes of reducing threats to public health, and ground and surface waters,
12 including the reduction of nitrogen discharges.

13 B. Upon determination by the Department that the owner has one or more onsite sewage systems
14 that are out of compliance with those regulations promulgated pursuant to this chapter, or in need
15 of repair or replacement, the owner shall follow the requirements in the Board's regulations to
16 initiate the repair or replacement of such systems. If the owner desires to be qualified by the
17 Department to receive a betterment loan, at any time before the repair or replacement is
18 completed, he shall provide the Department with an estimate of the approximate cost of such
19 remedial work, which the Department shall accept. The issuance of a permit by the Department
20 to repair or replace an onsite sewage system, combined with an estimate provided by the owner
21 to the Department, shall demonstrate eligibility for a betterment loan. Upon a determination of
22 eligibility, the Department shall notify the owner in writing. If the Department refuses the
23 request for an eligibility letter, the owner may appeal the refusal to the State Health Department
24 Sewage Handling and Disposal Appeal Review Board. It shall be the sole responsibility of the
25 owner to secure the betterment loan from or through a private lender. Local health departments
26 may provide a list of lenders available for this purpose. Nothing in this section shall be construed
27 as allowing construction or modification of an onsite or alternative discharging sewage system
28 without a permit issued by the Department.

29 C. Betterment loans made pursuant to this section shall be recorded in the deed book of the
30 circuit court clerk's office for the locality in which the land is located and an abstract of the loan
31 and betterment loan eligibility letter issued by the Department shall be indexed in the name of
32 the owner. Betterment loans made pursuant to this section may be recorded in increments by the
33 private lender as the repair or replacement of the onsite sewage system is completed, provided
34 that in no event shall the total amount recorded exceed the estimate provided to the Department,
35 without the Department approving an amendment to the repair permit, and issuing a revised
36 betterment loan eligibility letter. The Department may, subject to appropriate waivers for
37 economic hardship, charge the owner a fee not to exceed \$50 for each betterment loan eligibility
38 letter request made by an owner. The Department may require that the owner or private lender

provide the Department with proof that any betterment loan has been recorded in the deed book of the circuit court clerk's office for the locality in which the land is located.

The incurrence of a betterment loan pursuant to this section shall not be considered a breach of limitation or prohibition contained in a note, mortgage or contract on the transfer of an interest in the owner's property.

D. Where agreeable to the private lender and the conduit lender, if any, a locality may act as the collection agent for the payments made by the owner on a betterment loan. Any such payments collected by the locality shall be deemed to be held in trust by the locality for benefit of the private lender and conduit issuer, if any. The locality may receive a fee payable by the private lender or conduit loan provider, if any, for such service not to exceed one-eighth of one percent of the payments collected.

§ 32.1-164.1:01. Onsite Sewage Indemnification fund.

A. There is hereby created the Onsite Sewage Indemnification fund whose purpose is to receive moneys generated by a portion of the fees collected by the Department of Health pursuant to subsections C and E of § 32.1-164 and appropriated by the Commonwealth for the purpose of assisting any Virginia real property owner holding a valid permit to operate an onsite sewage system when such system or components thereof fail within three years of construction and such failure results from the negligence of the Department of Health. ~~The fund may also be used, in the discretion of the Board, to support the program for training and recognition of authorized onsite soil evaluators.~~

B. ~~Ten~~ Twenty-five dollars of each fee collected by the Department of Health pursuant to subsections C and E of § 32.1-164 shall be deposited by the Comptroller to this fund to be appropriated for the purposes of this section to the Department of Health by the General Assembly as it deems necessary.

C. The owner of an onsite sewage system that has been permitted by the Department of Health may cause, by filing a request for payment from the fund within one year from the date the system or components thereof failed, the Commissioner to review the circumstances of the onsite sewage system failure, if the onsite sewage system has failed within three years of construction. Upon the Commissioner's finding that the onsite sewage system was permitted by the Department and (i) the system or components thereof failed within three years of construction; (ii) that specific actions of the Department were negligent and that those actions caused the failure; and (iii) that the owner filed a request for payment from the fund within one year from the date the system or components thereof failed, the Commissioner shall, subject to the limitations stated herein, reimburse the owner for the reasonable cost of following the Board's regulations to repair or replace the failed onsite sewage system or components thereof.

74 D. Prior to receiving payment from the fund, the owner shall follow the requirements in the
75 Board's regulations to repair or replace the failed onsite sewage system or components thereof.

76 E. The total amount an owner may receive in payment from the fund shall not exceed \$30,000.
77 Only the costs of the system that failed or the costs of labor and equipment required to repair or
78 replace the failed onsite sewage system or components thereof are reimbursable by the fund.

79 F. If the Commissioner finds that the system was permitted by the Department and has failed
80 within three years of construction and that the failure resulted from faulty construction or other
81 private party error, the Commissioner may assist the owner of the failed system in seeking
82 redress from the system's builder or other private party.

83 G. Every request for payment from the fund shall be forever barred unless the owner has filed a
84 complete application as required by the Department. The request shall be filed with the
85 Commissioner within one year from the date that the onsite sewage system or components
86 thereof first failed. However, if the owner was under a disability at the time the cause of action
87 accrued, the tolling provisions of § 8.01-229 shall apply. The owner shall mail the request for
88 payment from the fund via the United States Postal Service by certified mail, return receipt
89 requested, addressed to the Commissioner.

90 In any action contesting the filing of the request for payment from the fund, the burden of proof
91 shall be on the owner to establish mailing and receipt of the notice in conformity with this
92 section. The signed receipt indicating delivery to the Commissioner, when admitted into
93 evidence, shall be prima facie evidence of filing of the request for payment from the fund under
94 this section. The request for payment from the fund shall be deemed to be timely filed if it is sent
95 by certified mail, return receipt requested, and if the official receipt shows that the mailing was
96 within the prescribed time limits.

97 Notwithstanding any provision of this article, the liability for any payment from the fund shall be
98 conditioned upon the execution by the owner of a release approved by the Attorney General of
99 all claims against the Commonwealth, its political subdivisions, agencies, and instrumentalities
100 and against any officer or employee of the Commonwealth in connection with or arising out of
101 the occurrence complained of.

102 H. The Commissioner and the Attorney General shall cooperatively develop an actuarially sound
103 program and policy for identifying, evaluating, and processing requests for payment from the
104 fund.

105 I. If the Commissioner refuses the request for payment from the fund, the owner may appeal the
106 refusal to the State Health Department Sewage Handling and Disposal Appeal Review Board.

107 J. Notwithstanding any other provision of this Section, up to 25 percent of the amount in the
108 indemnity fund on July 1 or other date that is the first day of any fiscal year may be made

available in that fiscal year by the Board, in its sole discretion, to provide betterment loans or to guarantee betterment loans authorized by Section 32.1-164.1:2. The Commissioner and the Attorney General shall cooperatively develop an actuarially sound program and policy for any such betterment loans or guarantees.

The Board may promulgate regulations pursuant to the Administrative Process Act (§ 2.2-4000 et seq.) for the administration of the fund consistent with this chapter.

In the event the fund is insufficient to meet requests for payment from the fund, this section and the creation of the fund shall not be construed to provide liability on the part of the Department or any of its personnel where no such liability existed prior to July 1, 1994.

§ 15.2-2157. Onsite sewage systems when sewers not available; civil penalties.

A. Any locality may require the installation, maintenance and operation of, regulate and inspect onsite sewage systems or other means of disposing of sewage when sewers or sewerage disposal facilities are not available; without liability to the owner thereof, may prevent the maintenance and operation of onsite sewage systems or such other means of disposing of sewage when they contribute or are likely to contribute to the pollution of public or private water supplies or the contraction or spread of infectious, contagious and dangerous diseases; and may regulate and inspect the disposal of human excreta.

B. Any locality that (i) has a record of the location of alternative onsite sewage systems; (ii) has notified owners of their maintenance responsibility for such systems; and (iii) has a method to identify property transfer may adopt an ordinance establishing a uniform schedule of civil penalties for violations of specified provisions for the operation and maintenance of alternative onsite sewage systems, as defined in § 32.1-163, that are not abated or remedied within 30 days after receipt of notice of violation from the local health director or his designee. It shall not be a defense to this section that the inventory of alternative sewage systems is incomplete, but no owner shall be issued a summons until after having received written notice of the maintenance responsibility for such system in the same manner as set forth in subsection F of this section. No civil action authorized under this section shall proceed while a criminal action is pending.

This schedule of civil penalties shall be uniform for each type of specified violation, and the penalty for any one violation shall be a civil penalty of not more than \$100 for the initial summons and not more than \$150 for each additional summons. Each day during which the violation is found to have existed shall constitute a separate offense. However, specified violations arising from the same operative set of facts shall not be charged more frequently than once in any 10-day period, and a series of specified violations arising from the same operative set of facts shall not result in civil penalties exceeding a total of \$3,000. If the violation is not abated within 60 days after the first award of civil penalties under this subsection ~~the imposition of the maximum fine~~, the locality may pursue other remedies as provided by law including, but not limited to, the filing of an injunction or other appropriate proceeding to restrain, correct, or abate a violation and where the owner of the real property is a party to such proceeding. At any time after the filing of an injunction or other appropriate proceeding in a circuit court to restrain, correct, or abate a violation and where the owner of the real property is a party to such

proceeding, the local health director or his designee may record a memorandum of lis pendens pursuant to § 8.01-268. Designation of a particular ordinance violation for a civil penalty pursuant to this section shall be in lieu of criminal penalties, except for any violation that contributes to or is likely to contribute to the pollution of public or private water supplies or the contraction or spread of infectious, contagious, and dangerous diseases.

The local health director or his designee may issue a civil summons ticket as provided by law for a scheduled violation. Any person summoned or issued a ticket for a scheduled violation may make an appearance in person or in writing by mail to the department of finance or the treasurer of the locality prior to the date fixed for trial in court. Any person so appearing may enter a waiver of trial, admit liability, and pay the civil penalty established for the offense charged.

If a person charged with a scheduled violation does not elect to enter a waiver of trial and admit liability, the violation shall be tried in the general district court in the same manner and with the same right of appeal as provided for by law. In any trial for a scheduled violation, the locality shall have the burden of proving by a preponderance of the evidence the liability of the alleged violator. An admission of liability or finding of liability under this section shall not be deemed an admission at a criminal proceeding.

This section shall be not interpreted to allow the imposition of civil penalties for activities related to land development.

C. When sewers or sewerage disposal facilities are not available, a locality shall not prohibit the use of alternative onsite sewage systems that have been approved by the Virginia Department of Health for use in the particular circumstances and conditions in which the proposed system is to be operating.

D. A locality shall not require maintenance standards and requirements for alternative onsite sewage systems that exceed those allowed under or established by the State Board of Health pursuant to § 32.1-164.

E. The State Health Commissioner shall require, as a precondition to the issuance of an alternative onsite sewage system permit pursuant to § 32.1-164 to serve a residential structure, that the property owner record an instrument identifying by reference the applicable maintenance regulations for each component of the system in the land records of the clerk of the circuit court in the jurisdiction where all or part of the site or proposed site of the onsite sewage system is to be located, which shall be transferred with the title to the property upon the sale or transfer of the land that is the subject of the permit.

F. Should an owner of an alternative onsite sewage system fail to remedy a violation which constitutes an imminent threat to health or safety within 60 days after an award of civil penalties pursuant to subsection B of this section, the locality may issue a written abatement notice to the owner of the property affected by the provisions of this section requiring the abatement or correction of the deficiencies outlined in the notice of violation within no less than 30 days of the notification. A written abatement notice sent by registered or certified mail to, or posted at, the last known address of the property owner as shown on the current real estate tax assessment

books or current real estate tax assessment records shall be deemed sufficient notice to the property owner and shall satisfy the notice requirements of this section. If, after such notice to the owner, the owner fails to begin, or cause to begin, and diligently pursue (i) construction, (ii) site work, or (iii) engineering to abate the violation, the locality may abate the violation and charge and collect the cost thereof from the owner of the property affected in any manner provided by law for the collection of state or local taxes.

Every charge authorized by this section which has been assessed against the owner of any such property and which remains unpaid shall constitute a lien against such property. Such liens shall have the same priority as other unpaid local taxes and shall be enforceable in the same manner as provided in Articles 3 (§ 58.1-3940 et seq.) and 4 (§ 58.1-3965 et seq.) of Chapter 39 of Title 58.1. A locality may waive such liens in order to facilitate the sale of the property. Such liens may be waived only as to a purchaser who is unrelated by blood or marriage to the owner and who has no business association with the owner. Until paid, all such liens shall remain a personal obligation of the owner of the property at the time the liens were imposed.

§ 32.1-163. Definitions.

As used in this article, unless the context clearly requires a different meaning:

"Alternative discharging sewage system" means any device or system which results in a point source discharge of treated sewage for which the Board may issue a permit authorizing construction and operation when such system is regulated by the State Water Control Board pursuant to a general Virginia Pollutant Discharge Elimination System permit issued for an individual single family dwelling with flows less than or equal to 1,000 gallons per day.

"Alternative onsite sewage system" or "alternative onsite system" means a treatment works that is not a conventional onsite sewage system and does not result in a point source discharge.

"Betterment loan" means a loan to be provided by private lenders either directly or through a state agency, authority or instrumentality or a locality or local or regional authority serving as a conduit lender, or authorized pursuant to Section 32.1-164.1:01(J), to repair, replace, or upgrade an onsite, ~~alternative onsite sewage system~~ or an alternative discharging sewage system for the purpose of reducing threats to public health and ground and surface waters, which loan is secured by a lien with a priority equivalent to the priority of a lien securing an assessment for local improvements under § 15.2-2411.

"Conduit lender" means a state agency, authority or instrumentality or a locality, local or regional authority or an instrumentality thereof serving as a conduit lender of betterment loans.

"Conventional onsite sewage system" means a treatment works consisting of one or more septic tanks with gravity, pumped, or siphoned conveyance to a gravity distributed subsurface drainfield.

"Licensed onsite soil evaluator" means a person who is licensed under Chapter 23 (§ 54.1-2300 et seq.) of Title 54.1 as an onsite soil evaluator. A licensed onsite soil evaluator is authorized to

225 evaluate soils and soil properties in relationship to the effects of these properties on the use and
226 management of these soils as the locations for onsite sewage systems.

227 "Maintenance" means performing adjustments to equipment and controls and in-kind
228 replacement of normal wear and tear parts such as light bulbs, fuses, filters, pumps, motors, or
229 other like components. Maintenance includes pumping the tanks or cleaning the building sewer
230 on a periodic basis. Maintenance shall not include replacement of tanks, drainfield piping,
231 distribution boxes, or work requiring a construction permit and installer.

232 "Operate" means the act of making a decision on one's own volition (i) to place into or take out
233 of service a unit process or unit processes or (ii) to make or cause adjustments in the operation of
234 a unit process at a treatment works.

235 "Operation" means the biological, chemical, and mechanical processes of transforming sewage
236 or wastewater to compounds or elements and water that no longer possess an adverse
237 environmental or health impact.

238 "Operator" means any individual employed or contracted by any owner, who is licensed or
239 certified under Chapter 23 (§ ~~54.1-2300~~ et seq.) of Title 54.1 as being qualified to operate,
240 monitor, and maintain an alternative onsite sewage system.

241 "Owner" means the Commonwealth or any of its political subdivisions, including sanitary
242 districts, sanitation district commissions and authorities, any individual, any group of individuals
243 acting individually or as a group, or any public or private institution, corporation, company,
244 partnership, firm or association which owns or proposes to own a sewerage system or treatment
245 works.

246 "Regulations" means the Sewage Handling and Disposal Regulations, heretofore or hereafter
247 enacted or adopted by the State Board of Health.

248 "Review Board" means the State Sewage Handling and Disposal Appeals Review Board.

249 "Sewage" means water-carried and non-water-carried human excrement, kitchen, laundry,
250 shower, bath or lavatory wastes, separately or together with such underground, surface, storm
251 and other water and liquid industrial wastes as may be present from residences, buildings,
252 vehicles, industrial establishments or other places.

253 "Sewerage system" means pipelines or conduits, pumping stations and force mains and all other
254 construction, devices and appliances appurtenant thereto, used for the collection and conveyance
255 of sewage to a treatment works or point of ultimate disposal.

256 "Subsurface drainfield" means a system installed within the soil and designed to accommodate
257 treated sewage from a treatment works.

258 "Transportation" means the vehicular conveyance of sewage.

259 "Treatment works" means any device or system used in the storage, treatment, disposal or
260 reclamation of sewage or combinations of sewage and industrial wastes, including but not
261 limited to pumping, power and other equipment and appurtenances, septic tanks, and any works,
262 including land, that are or will be (i) an integral part of the treatment process or (ii) used for
263 ultimate disposal of residues or effluents resulting from such treatment.